DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. WASHINGTON GENERAL CONTRACTORS Respondent	Case Nos.: I-00-10387 I-00-10412

FINAL ORDER

I. Introduction

On September 19, 2000, the Government served a Notice of Infraction (No. 00-10387) upon Respondent Washington General Contractors alleging violations of five separate rules: 21 DCMR 502.1, which requires all persons engaged in land disturbing activity to obtain a permit; 21 DCMR 505.3, which requires the holder of such a permit to notify the Government within two weeks of completion of the land disturbing activity; 21 DCMR 543.3, which requires submission of an erosion and sediment control plan for "major projects"; 21 DCMR 526.1, which requires persons who engage in any land disturbing activity, unless exempted, to institute appropriate storm water management measures; and 21 DCMR 531.1, which requires, in certain circumstances, submission of an appropriate storm water management plan. The Notice of Infraction alleged that the violations occurred or were determined on September 18, 2000 at 444 Condon Terrace, S.E. It sought separate fines of $500 for the alleged violation of § 502.1 and

the alleged violation of § 526.1, and separate fines of $100 for the alleged violations of §§ 505.3, 531.1 and 543.3. The total fine sought was $1,300.

Respondent did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Code § 6-2715). Accordingly, on October 18, 2000, this administrative court issued an order finding Respondent in default, assessing the statutory penalty of $1,300 authorized by D.C. Code § 6-2704(a)(2)(A), and requiring the Government to serve a second Notice of Infraction.

The Government then served a second Notice of Infraction (No. 00-10412) on October 31, 2000. Respondent also did not answer that Notice within twenty days of service. Accordingly, on December 22, 2000, a Final Notice of Default was issued, finding Respondent in default on the second Notice of Infraction and assessing total penalties of $2,600 pursuant to D.C. Code §§ 6-2704(a)(2)(A) and 6-2704(a)(2)(B). The Final Notice of Default also set January 17, 2001 as the date for an *ex parte* proof hearing, and afforded Respondent an opportunity to appear at that hearing to contest liability, fines, penalties or fees. Copies of both the first and second Notices of Infraction were attached to the Final Notice of Default.

The Government, represented by Carlos Fields, the inspector who issued the Notice of Infraction, appeared for the hearing on January 17, 2001. Respondent did not appear. After hearing the Government's testimony and admitting certain of its exhibits into evidence, I left the record open to allow the Government to file evidence demonstrating the total area of the construction project at issue. The Government timely filed its proposed exhibits on January 29 and February 6, 2001.

Based upon the testimony at the hearing, my evaluation of the credibility of the Government's witnesses, the documents admitted into evidence, and the entire record in this case, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

On September 18, 2000, Mr. Fields observed a newly-paved parking lot on property located at 444 Condon Terrace, S.E. The property belongs to Paramount Baptist Church (the "Church") and is adjacent to the Church building. Mr. Fields had observed the site previously and had noted that an apartment building was located there. On September 18, however, the building had been torn down and replaced by the parking lot.

In discussions with Ms. Vivian Townsell, a trustee of the Church, Mr. Fields learned that Respondent Washington General Contractors, Inc. had paved the parking lot. On March 28, 2000, the Department of Consumer and Regulatory Affairs ("DCRA") issued a building permit authorizing the Church to raze the apartment house, but the permit did not authorize the paving of the lot. Ms. Townsell testified at the hearing, and I credit her testimony that Respondent was the paving contractor and that the Church had paid Respondent to obtain an additional permit authorizing the paving of the lot. I also credit Mr. Fields' testimony that his search of the DCRA permit files disclosed no permit authorizing the paving of the lot. Based upon his testimony, I also find that no erosion and sedimentation control plan for the parking lot project was submitted to DCRA or to the Department of Health.

The contract between Respondent and the Church for the parking lot project is in evidence as Petitioner's Exhibit ("PX") 107. It requires Respondent, among other duties, to "excavate and remove excess dirt and debris" and to undertake "clearing and removal of trees and stumps along rear lot." The total cost for the project, as stated in the contract, was $18,200.

Mr. Fields took several pictures of the parking lot on September 18, 2000. Four of those pictures are in evidence as PX 106. Mr. Fields identified a darker area of the parking lot observed in one of the photographs as an area where he had observed vegetation growing before the construction of the parking lot. I credit that testimony and find, from my observation of the photograph, that the area of the formerly vegetated section was at least 50 square feet. The photographs, however, are not sufficient to demonstrate whether the new parking lot covers at least 5,000 square feet. Because some of the regulations at issue apply only to construction or grading operations that disturb at least 5,000 square feet of earth, I left the record open to permit the Government to submit evidence of the measurements of the area. The government filed its submissions on January 29, and February 6, 2001. As discussed below, *see* footnote 4 *infra*, I ultimately do not need to decide whether the Government's proffered evidence is sufficient to demonstrate whether more than 5,000 square feet were disturbed.

The Notices of Infraction were sent to Respondent by certified mail as evidenced by the certification of the Government's representative on the certificates of service. Both Notices of Infraction were actually received by Respondent, as evidenced by the certified mail receipts contained in the record. PX 100, 101, 104, 105. This administrative court's orders of October 18 and December 22, 2000 were sent by first class mail and have not been returned to the clerk's office.

III. Conclusions of Law

A. Notice to Respondent

Respondent received adequate notice of the charges and of the hearing date, as required by the Due Process Clause and the Civil Infractions Act. D.C. Code §§ 6-2711 and 6-2715. The evidence shows that Respondent actually received both Notices of Infraction. The orders of October 18 and December 22 were mailed to Respondent and have not been returned by the Postal Service. This is sufficient to demonstrate proper notice. *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 800 (1983); *McCaskill v. District of Columbia Dep't of Employment Servs.,* 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep't of Employment Servs.,* 487 A.2d 622, 624 (D.C. 1985).

B. Respondent's Violations

The regulations allegedly violated by Respondent fall into two distinct groups. Three of them – 21 DCMR 502.1, 21 DCMR 505.3, and 21 DCMR 543.3 – are part of the erosion and sedimentation control regulations, while the other two – 21 DCMR 526.1 and 21 DCMR 531.1 – deal with the distinct, but related, topic of storm water management. I will discuss each group of regulations separately.

1. The Erosion and Sedimentation Control Regulations

21 DCMR 502.1 provides:

> No person may engage in any land disturbing activity on any property within the District until that person has secured a building permit from the District. Approval of a building permit shall be conditioned upon submission by the permit applicant of an erosion and sedimentation plan which has been reviewed and approved by the Department.

The evidence requires resolution of two legal questions: First, was the paving of the parking lot "land disturbing activity"? If so, did the building permit authorizing the razing of the apartment house satisfy § 502.1?

The rules define "land disturbing activity" as

> any earth movement or land change which may result in soil erosion from water or wind and the movement of sediments in the District of Columbia, including, but not limited to, *stripping*, grading, *excavating*, transporting and filling of land, construction or demolition of buildings or structures.

21 DCMR 599.1 (emphasis added).

The contract between Respondent and the Church for the paving of the parking lot requires Respondent to perform soil excavation, an activity that falls within the definition of "land disturbing activities." Moreover, "stripping" is another element of the definition of "land disturbing activity" and is defined as "any activity which removes or significantly disturbs the vegetative surface cover." 21 DCMR 599.1. The removal of the vegetation that is called for by the contract and was observed by Mr. Fields satisfies that definition. Respondent, therefore, engaged in land disturbing activities for which a permit was required.

The permit that authorized the razing of the apartment building was not sufficient to authorize the excavations associated with the parking lot project. The permit identifies the authorized work as "raze 3-story masonry Apt Bldg." There is no mention of constructing a parking lot or of any other land disturbance. Respondent, therefore, could not rely upon that permit to authorize the additional disturbance of the land associated with the separate activity of constructing a parking lot. Because there is no evidence of any other building permit for the parking lot project, Respondent violated § 502.1

The Government also charged Respondent with violating 21 DCMR 505.3 by failing to give notification of the completion of the parking lot project. That section provides: "The permittee shall be responsible for notifying the Department within two (2) weeks after completion that the land disturbing activity has been completed." The Government's theory was that Respondent violated that section by not notifying the Department of Health of the completion of the parking lot. Section 505.3, however, applies only to a "permittee." Because Respondent never obtained a permit for the parking lot project, it was not a "permittee" and its failure to provide notice of the completion of the project did not violate § 505.3. *Cf. DOH v. Sports Systems, Inc.*, No. I-00-11058, OAH Final Order (April 4, 2001) (Only a permit holder is liable under 21 DCMR 506.1 for failure to comply with an approved soil and sedimentation plan.)[1]

The final section of the soil and sedimentation regulations at issue is 21 DCMR 543.3, which provides, in relevant part: "An erosion and sediment control plan shall be required for all major projects." Pursuant to the regulations, all construction projects are major projects, unless the area disturbed is less than 50 square feet or the total construction cost is less than $2500. 21 DCMR 543.1.[2] Neither exception applies here. The evidence shows that the area of land disturbance exceeds 50 square feet, and the total cost of the parking lot project was $18,200. The

[1] If the Government's theory were that Respondent did not provide notice of the completion of the razing of the apartment building (for which a permit *was* issued), there still would be no violation of § 505.3. There was no evidence of a failure to give notice when the razing was finished. Moreover, the Church was the holder of the permit for the razing of the building. PX 108. Respondent, therefore, was not the permittee for that project and could not violate § 505.3 with respect to it.

[2] Projects that include razing activities are always regarded as major, regardless of the cost or the area of earth disturbed. 21 DCMR 543.3. The Government has not alleged any violation of § 543.3 with respect to the razing of the building, however.

parking lot project, therefore, was a major project and § 543.3 required Respondent to submit an erosion and sediment control plan for it. Because Respondent did not do so, it violated 21 DCMR 543.3.

Although §§ 502.1 and 543.3 deal with similar subjects, they define different offenses. A violation of § 502.1 occurs: 1) if a person engages in land disturbing activity 2) without the issuance of a building permit authorizing that activity. Section 543.3 requires: 1) submission of an erosion and sedimentation control plan 2) for certain land disturbing activities (*i.e.*, those classified as "major projects"). Section 502.1 is violated when *actual land disturbing activity* takes place without a building permit, while section 543.3 is violated when an erosion and sedimentation control plan is not submitted *in advance* of certain land disturbing activities.[3] Separate fines may be imposed for violating both provisions, because each provision requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299 (1932); *Albernaz v. United States,* 450 U.S. 333, 337 (1981). *See Mack v. United States,* 2001 D.C. App. Lexis 111 (D.C. May 10, 2001) at *5 (confirming that the *Blockburger* rule of statutory construction is applicable in the District of Columbia).

2. The Storm Water Management Regulations

The Government also alleged that Respondent violated two storm water management regulations: 21 DCMR 526.1 and 21 DCMR 531.1. I will first discuss the alleged violation of 21 DCMR 531.1, which requires "every applicant" to submit a storm water management plan for

[3] While § 502.1 provides that approval of an erosion and sedimentation control plan is necessary for approval of a building permit, submission of such a plan does not guarantee the issuance of the permit, which may be refused for a number of unrelated reasons. *See generally* 12A DCMR 107.

review. "Applicant" is defined as "any person who requests approval of a development." 21 DCMR 599.1. There is no evidence, however, that Respondent ever sought approval of the parking lot project. Respondent, therefore, is not an "applicant" as defined in the regulations, and can not be liable for violating § 531.1. Accordingly, that charge must be dismissed.

The other storm water management regulation allegedly violated by Respondent is 21 DCMR 526.1, which provides:

> No person shall, unless exempt, engage in any earth movement or land change within the District of Columbia without instituting appropriate storm water management measures to control or manage runoff from such developments. These measures shall conform to the provisions in §§ 526 through 535 of this chapter.[4]

Section 526.1 is a catch-all section requiring compliance with the more specific storm water management provisions in the regulations. The Government can prove a violation of § 526.1 only by proving that one of the other sections has been violated. In this case, the only basis for the charge of violating § 526.1 stated by the Government was that Respondent failed to submit a storm water management plan as required by § 531.1. As discussed above, however, Respondent committed no violation of § 531.1. Consequently, there is no support for the

[4] The only exemption that might be applicable in this case is 21 DCMR 527.1(g), which exempts construction or grading operations that disturb 5,000 square feet of land area or less. As discussed below, I have found Respondent not liable under § 526.1 on other grounds. Accordingly, I do not need to decide whether the Government has submitted sufficient evidence of the square footage of the parking lot project. I note, however, that both at the hearing and in my order of January 30, 2001, I required that any measurements submitted after the hearing be accompanied by an affidavit authenticating them. The Government's submission of an unsworn memorandum did not comply with those instructions, and might have resulted in a finding that there was insufficient proof of the size of the development, had I found it necessary to reach the issue.

Government's theory that, by violating § 531.1, Respondent also violated § 526.1.[5] Accordingly, the Government did not prove a violation of § 526.1, and that charge also must be dismissed.

C. Fines and Penalties

I have found Respondent liable for violating two of the regulations cited by the Government – 21 DCMR 502.1 and 21 DCMR 543.3. A violation of § 502.1 is a Class 2 infraction, for which a fine of $500 is prescribed for a first offense. 16 DCMR 3234.1(a); 16 DCMR 3201.1(b). A violation of § 543.3 is a Class 3 violation, which carries a fine of $100 for a first offense. 16 DCMR 3234.2(dd); 16 DCMR 3201.1(b). Respondent's total fine, therefore, is $600.

The Civil Infractions Act, D.C. Code §§ 6-2712(f) and 6-2715, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within twenty days of the date of service by mail. If a party can not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Code §§ 6-2704(a)(2)(A), 6-2712(f). If a recipient fails to answer a second Notice of Infraction without good cause, the penalty doubles. D.C. Code §§ 6-2704(a)(2)(B), 6-2712(f).

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[5] In light of this result, it is not necessary to decide whether § 531.1 and § 526.1 define separate offenses. Because the Government relied upon the alleged violation of § 531.1 to prove a violation of § 526.1, it is likely that § 531.1 is a lesser-included offense of § 526.1. That could mean that the same conduct would not support the imposition of a fine for violating both § 526.1 and § 531.1. *Cf. United States v. Dixon*, 509 U.S. 688 (1993) (successive prosecutions for violating a court order not to commit a crime and for the underlying crime itself are impermissible). When the potential overlap was called to the Government's attention at the hearing, it moved to dismiss the charge of violating § 526.1. I reserved decision on that motion, and now deny it as moot. Because there has been no violation of either section, I do not reach the question whether separate fines could be imposed in a case in which violations of both sections are proven.

Because Respondent introduced no evidence of the reasons for its failure to answer the Notices of Infraction, there is no basis for concluding that it had good cause for that failure. In prescribing the penalty, the statute does not distinguish between charges that the Government has proved and those for which there has been a failure of proof. The statutory penalty for failure to file does not depend upon whether the Government has established the underlying violations. Indeed, a contrary rule would subvert the purpose of the penalty provisions of the Civil Infractions Act, which is to promote an efficient adjudication system by encouraging prompt filing of responses to Notices of Infraction. Respondents who believe that they have a valid defense to a charge would have no incentive to file a prompt response if their ultimate vindication would eliminate the late filing penalty. Consequently, I will impose a penalty for Respondent's failure to answer all of the violations alleged by the Government. *Accord, DOH v. Williams Pest Control Co.*, No. I-00-20085, OAH Final Order at 5 (June 7, 2001).

The authorized fines for the five violations alleged by the Government total $1,300. 16 DCMR 3234.1(a), 3234.1(c), 3234.2(b), 3234.2(g) and 3234.2(dd). The statutory penalty for Respondent's failure to answer the Notices of Infraction, therefore, is $2,600, which must be added to the $600 in fines for which Respondent is also liable.

IV. Order

Based on the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2001:

ORDERED, that Respondent is not liable for violating 21 DCMR 505.3, 21 DCMR 526.1 or 21 DCMR 531.1, and those charges are **DISMISSED;** and it is further

ORDERED, that Respondent is liable for violating 21 DCMR 502.1 and 21 DCMR 543.3; and it is further

ORDERED, that Respondent is liable for failing to answer both the first Notice of Infraction and the second Notice of Infraction without good cause; and it is further

ORDERED, that Respondent shall pay a total of **THREE THOUSAND TWO HUNDRED DOLLARS ($3,200)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

ORDERED, that, if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Code § 6-2713(i), and the sealing of Respondent's business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

FILED 07/11/01

John P. Dean
Administrative Judge